

Appeal from a decision of Administrative Law Judge David Torbett upholding decisions by the Office of Surface Mining Reclamation and Enforcement to grant Phase I releases of reclamation performance bonds with respect to permitted surface coal mining operations. GA-002 and GA-006.

Affirmed.

1. Administrative Procedure: Burden of Proof--Rules of Practice: Appeals: Burden of Proof--Surface Mining Control and Reclamation Act of 1977: Bonds: Release of--Surface Mining Control and Reclamation Act of 1977: Performance Bond or Deposit: Release

A party appealing under the regulations at 43 CFR 1280-1286 an OSM decision to grant a Phase I bond release with regard to a reclaimed area bears the burden of showing that OSM erred.

2. Surface Mining Control and Reclamation Act of 1977: Bonds: Release of--Surface Mining Control and Reclamation Act of 1977: Performance Bond or Deposit: Release

A Phase I bond release may be upheld despite the absence of topsoil on the reclaimed area when, in response to a citation for failure to segregate topsoil, the permittee has agreed to amend the soil as necessary to support vegetation. Condition of the soil is properly considered in determining compliance with revegetation requirements when considering a Phase II bond release.

3. Surface Mining Control and Reclamation Act of 1977: Bonds: Release of--Surface Mining Control and Reclamation Act of 1977: Performance Bond or Deposit: Release

A decision to grant a Phase I bond release on the ground the permit areas has been graded and backfilled to approximate original contour will be upheld

where the record establishes that the surface configuration achieved by backfilling and grading the mined area closely resembles the general configuration of the land prior to mining with all highwalls eliminated.

APPEARANCES: Herbert E. Franklin, Jr., Esq., Trenton, Georgia, for appellants; Charles P. Gault, Esq., Office of the Solicitor, Knoxville, Tennessee, for Office of Surface Mining Reclamation and Enforcement.

#### OPINION BY ADMINISTRATIVE JUDGE GRANT

William H. Pullen, Jr., and other appellants <sup>1/</sup> have brought this appeal from a February 23, 1992, decision of Administrative Law Judge David Torbett, upholding decisions of the Office of Surface Mining Reclamation and Enforcement (OSM) to grant Phase I releases of reclamation performance bonds. The bonds were issued with respect to surface coal mining operations conducted by the Jackson County Mining Corporation (JCMC), in Dade County, Georgia, under OSM permits GA-002 and GA-006. The permits cover a total of about 310 acres of land owned by the Pullens, who granted JCMC the right to mine the coal by surface methods under two leases. The two permit areas are known as the Pullen Mine (GA-002) and Pullen Mine No. 2 (GA-006). They are virtually adjacent. See Exhs. A-29, A-30, and G-10.

The issue in the present case is whether OSM was justified in partially releasing JCMC's reclamation bonds on the ground it had sufficiently reclaimed the permitted land, in accordance with the Surface Mining Control and Reclamation Act of 1977 (SMCRA), as amended, 30 U.S.C. §§ 1201-1328 (1988), and its implementing regulations. <sup>2/</sup> The land was originally permitted to JCMC by OSM for surface mining purposes on December 17, 1982, and December 14, 1983. Mining, which involved removing overburden and then excavating the underlying coal, was brief, concluding in about 1983 or 1984. See Tr. 22, 270. At that time, 296 acres of land had been disturbed by mining. See Exh. G-1 ("Mine Site Evaluation Inspection Report[s]" (GA-002 and GA-006), dated Jan. 21, 1988, at 1). As a result of JCMC's subsequent bankruptcy, the American Standard Coal Company, Inc. (American Standard), undertook to complete reclamation of the land under the approved mining and reclamation plans. See Tr. 27, 55-56. These plans were later revised, with OSM's approval, on January 27,

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<sup>1/</sup> The appellants are William H. Pullen, Jr., Sandra T. Pullen, William H. Pullen, Sr., and Martha Frances Wells Pullen.

<sup>2/</sup> The amount of the reclamation bonds is \$363,000 in the case of permit GA-002 (BD400271) and \$273,700 in the case of permit GA-006 (BD400365). A Phase I release of the bonds would entail the release of 60 percent of each of the bonds, or \$217,800 (GA-002) and \$164,220 (GA-006). See 30 U.S.C. § 1269(c)(1) (1988); 30 CFR 800.40(c). The remaining bonds would amount to \$145,200 (GA-002) and \$109,480 (GA-006).

1987. 3/ See Exh. G-5; Letter to OSM from TARE, Inc. (TARE), dated Nov. 17, 1986.

On January 28, 1988, following the denial of prior requests, American Standard applied to OSM, on behalf of JCMC, for a Phase I reclamation bond release. 4/ See Tr. 26-28, 49, 122. It claimed that the required reclamation had been completed on May 1, 1987. In response thereto, the permit areas were inspected by Dykes and OSM inspector Wayne Stanley on February 17, 1988. See Tr. 29, 31. They found backfilling and grading generally acceptable for a Phase I release. See Tr. 31-32; Exh. G-1 ("Mine Site Evaluation Inspection Report[s]" (GA-002 and GA-006), dated Mar. 3, 1988).

Having been notified of the request for Phase I bond release, the Pullens objected to any bond release on March 16, 1988, pursuant to section 519(f) of SMCRA, 30 U.S.C. § 1269(f) (1988). On April 5, 1988, Dykes and Stanley conducted another inspection of the permit areas. See Tr. 31. They were accompanied by William H. Pullen, Jr., and his father, who identified areas where reclamation was not considered adequate. The OSM inspectors found

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3/ Appellants have challenged the permit revision. There is no evidence that the approval process did not comport with the applicable legal requirements. See 30 U.S.C. §§ 1261(a), 1263(a) and (b), and 1264 (1988); 30 CFR 773.13, 773.15, 773.19(b)(1), 774.13(a)-(c), 778.21, and 910.774(a) and (b). In particular, the preponderance of the credible evidence establishes that the Pullens were provided notice and an opportunity to present their views to OSM regarding the proposed revision of the permits, prior to approval of the revision. See Tr. 71-72, 109-10, 285-86, 297-98, 323; Exh. G-13. The record also indicates that, through their attorney, they received notice of OSM's approval of the permit revision. See Letter to American Standard from OSM, dated Jan. 27, 1987, at 5. There is no evidence that they challenged the revision at the time. Finally, there is no showing that approval of the revision was not in accord with SMCRA.

4/ The record indicates that American Standard sold coal as an agent for JCMC and held a 50 percent interest in that firm. Further, American Standard guaranteed JCMC's obligations under the performance bonds. Accordingly, American Standard proceeded to perform the reclamation work on the permits. See Exh. G-1 (Attachment to Memorandum from David Dykes, OSM Reclamation Specialist, to Director, Birmingham Field Office, OSM, dated May 10, 1988, at 2). The Pullens assert that Judge Torbett improperly considered American Standard the "permittee" for purposes of seeking a Phase I bond release. See Statement of Reasons for Appeal (SOR) at 1. We find that Judge Torbett properly concluded that American Standard was entitled to apply for a bond release on its own behalf. See Decision at 17. We affirm this holding on the ground that American Standard as the guarantor of the permittee's reclamation obligation is a party in interest in this bond release proceeding and may seek release on behalf of the permittee. See 30 U.S.C. § 1269(a) (1988); 30 CFR 800.40(a)(1).

backfilling and grading generally in compliance with applicable standards. See Exh. G-1 ("Mine Site Evaluation Inspection Report[s]" (GA-002 and GA-006), dated May 5, 1988). A public hearing was held before an OSM hearing officer on April 14, 1988, in accordance with 30 U.S.C. § 1269(f) (1988), and 30 CFR 800.40(f).

Finally, in a May 10, 1988, memorandum, Dykes recommended that OSM grant the requested Phase I bond releases. In particular, he concluded that JCMC had restored the permit areas to their approximate original contour (AOC) and rendered the land capable of supporting its postmining land use (*i.e.*, pasture). Thereafter, OSM, in two May 10, 1988, decisions, agreed to Phase I releases of both reclamation bonds. An appeal was taken to the Board by the Pullens.

Finding that the appeal raised a number of questions of material fact, the Board set aside OSM's May 1988 decisions and referred the case to the Hearings Division, Office of Hearings and Appeals. William Helton Pullen, Jr., 112 IBLA 218 (1989). The referral was for the purpose of holding a hearing and rendering a decision on the question of whether the legal predicates for a Phase I release had been satisfied. 5/

A 2-day hearing was held before Judge Torbett in Chattanooga, Tennessee, on May 23 and 24, 1990. At the conclusion of the hearing, the record was held open in order to allow the Pullens to submit the deposition of Gerald T. Kessler, an employee of Atlantic Aerial Surveys, Inc. After reviewing all of the evidence and the briefs submitted by the parties, Judge Torbett issued his February 1992 decision, ruling that OSM had properly granted Phase I reclamation bond releases with respect to JCMC's surface mining operations. This appeal was brought from that decision.

In their statement of reasons (SOR) for appeal, appellants contend that Judge Torbett erroneously concluded that Phase I release of the

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5/ Subsequent to the docketing of this appeal from the decision of the Administrative Law Judge, we have received an appeal by the same parties from a later decision of the Director, Birmingham Field Office, OSM, approving an application for Phase II bond release on the same permits. The latter appeal has been docketed as IBLA 94-838. Counsel for OSM has requested that these appeals not be consolidated. In support, OSM asserts that the Phase II decision is contingent on the result of the appeal of the Phase I OSM determination (which is the subject of this decision) and expresses the desire to avoid any unnecessary delay in resolving the Phase I appeal. Appellants have not objected to the motion. In view of the fact that the issue of the legal sufficiency of the record to support the Phase I bond release decision is independent of the adequacy of the record to support a Phase II release, we grant the motion and decide in this case only the question of the Phase I bond release.

reclamation bonds was properly approved by OSM. Appellants contend the Administrative Law Judge erred in placing the burden of proof upon them. Further, appellants assert error on the ground that JCMC failed to properly replace topsoil removed from the permit areas, restore the permit areas to their AOC, eliminate all of the highwalls, render the drainage patterns on the permit areas substantially unchanged, and make the permit areas suitable for their postmining land use. In all these respects, appellants generally assert that the February 1992 decision is contrary to the "weight of the evidence" (SOR at 1).

[1] As a preliminary matter, we address appellants' contention that Judge Torbett improperly held that appellants have the burden of proving that the permit areas had not been adequately reclaimed for purposes of a Phase I bond release. See Decision at 18. The applicable regulations governing appeals from OSM decisions approving requests for release of bonds do not specify who bears the ultimate burden of proof. See 43 CFR 4.1280 to 4.1286. However, a party asserting that OSM has failed to abide by any requirement of SMCRA is generally considered the "proponent of the rule." That is true by virtue of regulation in the case of a party challenging the issuance, renewal, or revision of permits; the approval of permit conditions; or the suspension or revocation of permits by OSM, on the basis that it failed to comply with SMCRA. See 43 CFR 4.1193 and 4.1366; Peabody Coal Co. v. OSM, 123 IBLA 195, 207 (1992). Similarly, a party objecting to an OSM decision not to enforce SMCRA in the face of a "citizen's complaint" by that party has been deemed to bear the burden of proving that OSM acted in error. 6/ See Peter J. Rosati, 119 IBLA 219, 224 (1991); Willie N. Cook, 107 IBLA 278, 282 (1989); Dennis Zaccagnini, 96 IBLA 97, 103-04 (1987); Kenneth Marsh, 82 IBLA 3, 5 (1984). Likewise, one challenging OSM's issuance of a notice of violation or cessation order or assessment of civil penalties, on the basis that OSM incorrectly determined that a violation of SMCRA occurred, has the burden of proof. See 43 CFR 4.1155 and 4.1171. Also, one claiming that OSM wrongly determined that a person is not exempt or does not hold a valid existing right under SMCRA bears the burden of proof. See 43 CFR 4.1394; Silica Mining Corp. v. OSM, 126 IBLA 191, 196 (1993). In all such circumstances, the party asserting lack of compliance by OSM with SMCRA is properly held to bear the ultimate burden of persuading the Department, by a preponderance of the evidence, that the SMCRA requirements have not been met. See, e.g., Harry Smith Construction Co. v. OSM, 78 IBLA 27, 34 (1983). In challenging a determination by OSM that a permittee is entitled to a bond release on the basis that OSM erroneously concluded that the permittee has

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6/ An appeal by a third party from an OSM decision declining to take enforcement action against a permittee is brought under the regulations at 43 CFR 4.1280 to 4.1286 like an appeal by a third party from an OSM decision granting a permittee's bond release request. See 30 CFR 842.15(d). Thus, there should be a similar assignment of the burden of proof.

satisfied the requirements for a release set forth in section 519(c) of SMCRA, we find that a third party is properly considered the "proponent of the rule." See 5 U.S.C. § 556(d) (1988); Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959); In Re Pacific Coast Molybdenum Co., 75 IBLA 16, 21-22, 90 I.D. 352, 355-56 (1983). As such, it properly bears the ultimate burden of proving that OSM incorrectly granted a release to the permittee.

We find that appellants have failed to demonstrate error in Judge Torbett's February 1992 decision. OSM is authorized by section 519(c) of SMCRA, 30 U.S.C. § 1269(c) (1988), to release a reclamation bond in whole or in part where it is satisfied that the required reclamation has been accomplished. See 30 CFR 800.40(c). In the case of a Phase I release, OSM must be satisfied that the permittee has completed "backfilling, regrading, and drainage control \* \* \* in accordance with his approved reclamation plan." 30 U.S.C. § 1269(c)(1) (1988)). 7/ See William Helton Pullen, Jr., supra at 221-22. In determining whether reclamation has been properly completed, we affirm Judge Torbett's holding that a permittee in Georgia must ultimately be judged by the applicable performance standards set forth in 30 CFR Part 816. See Decision at 18; 30 CFR 910.816(a).

[2] Appellants charge that JCMC failed to replace the topsoil removed from the permit areas during the course of surface coal mining operations. It appears from the record that JCMC failed to segregate the topsoil removed from the mined land and then to replace it, as required by sections 515(a)(b)(5) and (6) of SMCRA, 30 U.S.C. § 1265(b)(5) and (6) (1988), and its initial mining and reclamation plans. See 30 CFR 816.22(a)(1)(i) and (d)(1); Tr. 64, 69-70, 71, 127, 143, 178-79, 275, 316; Technical and Environmental Analysis (TEA) (GA-002) at 6; TEA (GA-006) at V-23. In removing the topsoil, JCMC mixed it with the subsoil and then returned this mixture to the disturbed areas. See Tr. 71, 148-49, 177, 178-79, 291. A notice of violation (NOV) was issued and OSM and the permittee agreed to abatement of the violation by means of implementing a topsoil substitute plan, which involved amending the soil actually placed on the mined land as necessary to support vegetation. See Tr. 70, 131, 133. The regulations authorize OSM to permit "[s]elected overburden materials" to be substituted for topsoil where it is demonstrated that the "resulting soil medium is equal [in its suitability to sustain vegetation] to \* \* \* the existing topsoil, and \* \* \* is the best available in the permit area to support revegetation." 30 CFR 816.22(b); see Tr. 327; Turner Brothers Inc. v. OSM, 102 IBLA 111, 113-14, 127-29 (1988); Alabama By-Products Corp., 1 IBSMA 239, 86 I.D. 446 (1979).

The absence of topsoil itself does not preclude approval of a Phase I bond release. See Tr. 133. There is no such requirement in section 519(c)

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7/ These requirements are reiterated in 30 CFR 800.40(c), which is applicable to surface coal mining and reclamation operations in the State of Georgia under 30 CFR 910.800.

of SMCRA. See 30 U.S.C. § 1269(c) (1988). The relevant implementing regulation provides that replacement of topsoil "may" be included in what is required of a permittee to complete the required regrading of its permit area for purposes of a Phase I release. 30 CFR 800.40(c)(1). However, this is not necessarily required at the Phase I stage. The NOV issued for failure to segregate the topsoil was abated by an agreement to amend the soil on the permit as necessary to support vegetation. Condition of the soil is an issue when OSM is determining whether a permittee has complied with the revegetation requirements of section 515(b)(19) of SMCRA, 30 U.S.C. § 1265(b)(19) (1988), for purposes of deciding whether to grant a Phase II bond release. See Tr. 131, 136; Decision at 24; 30 U.S.C. § 1269(c) (1988); 30 CFR 800.40(c). Thus, we conclude that appellants have failed to show error in the Phase I bond release on the ground that the topsoil was not segregated.

[3] Appellants also challenge permittee's compliance with the requirement to return the permit area to AOC. Section 515(b)(3) of SMCRA requires the permittee to backfill and grade the mined land so as to restore it to its "approximate original contour." 30 U.S.C. § 1265(b)(3) (1988); see also 30 CFR 816.102(a). AOC is defined by section 701(2) of SMCRA, to mean that the surface configuration of the reclaimed land achieved "closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain, with all highwalls and spoil piles eliminated." 30 U.S.C. § 1291(2) (1988). The implementing regulation defines AOC in relevant part as:

[T]hat surface configuration achieved by backfilling and grading of the mined areas so that the reclaimed area, including any terracing or access roads, closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain, with all highwalls, spoil piles, and coal refuse piles eliminated.

30 CFR 701.5.

Appellants challenge AOC compliance on several grounds. As an initial matter, appellants assert that the topographic contours of the land after reclamation do not match the premining contours. The record establishes that the premining contours could never be fully restored using the remaining material available to the permittee, especially given the "swell" in the replaced overburden and the void left by the removed coal. See Tr. 76-77, 104-05, 218-19; TEA (GA-002) at 39; TEA (GA-006) at V-20. That is not required by SMCRA. See Peter J. Rosati, supra at 224 (referring to H.R. Rep. No. 218, 95th Cong., 1st Sess. 96 (1977), reprinted in 1977 U.S. Code Cong. & Admin. News 593, 633). As Judge Torbett held the Department has required that the general configuration of the terrain following reclamation be "comparable" to the premining terrain (Decision at 18). See

Exh. G-2 (OSM Directive INE-26, dated May 26, 1987) at 2. Thus, an area that was "basically level or gently rolling before mining" should, after mining, "retain th[o]se general features" (Decision at 19 (quoting from Exh. G-2 at 2)). Appellants do not dispute application of this Departmental policy directive, which was relied upon by OSM in the present case. See Tr. 33. Moreover, we have upheld its use. See Pacific Coast Coal Co., 118 IBLA 83, 114-15, 117, 98 I.D. 38, 55, 56-57 (1991).

Looking at the two tracts of land in their entirety, it is clear, as Judge Torbett found, that there are "no truly substantial deviations" between pre- and postmining contours (Decision at 19). At worst, the deviations may reach 40 feet in one place. See Tr. 201-02, 213, 305; Exhs. A-32 and A-33. However, in general, they are not that great. Further, overall, such limited deviations are not considered violative of the requirement of AOC. <sup>8/</sup> Indeed, even with these deviations, the general surface configuration of the land is basically the same before and after mining and reclamation, as required by SMCRA. This is demonstrated by the fact that witnesses for both OSM and appellants agreed (for the most part) that the reclaimed land generally blends in with the surrounding land, as it had before mining. See Tr. 34, 39, 43-44, 77, 102-03, 165, 221. This is evident in aerial photographs of the mined land after mining and reclamation. See Exhs. A-29, G-3, G-4, and G-11. Thus, the preponderance of the evidence supports the conclusion that JCMC achieved an approximation of the original contours following backfilling and grading as required by law. See 30 U.S.C. § 1265(b)(3) (1988); 30 CFR 816.102(a); Peter J. Rosati, supra at 224. Land that was generally "gently rolling" before mining has retained that characteristic after mining and reclamation (Exh. G-2 at 2). See Tr. 34, 103, 220, 287, 343; TEA (GA-002) at 1; TEA (GA-006) at V-2. This is well documented by photographs of much of the permit areas, both from the air and ground. See Exhs. A-29, G-3, G-4, G-6, G-7, G-8, G-9, and G-11.

Appellants also challenge the AOC finding on the ground that JCMC failed to remove all of the highwalls. Section 515(b)(3) of SMCRA requires a permittee to eliminate all highwalls. 30 U.S.C. § 1265(b)(3) (1988); see 30 CFR 816.102(a). This is an absolute requirement. See Cherry Hill Development v. OSM, 110 IBLA 185, 198 (1989), appeal filed, Cherry Hill Development v. United States, No. 89-224 (E.D. Ky. Sept. 14, 1989). Noting that the photograph of the alleged highwall introduced by appellants exaggerated the steepness of the slope, Judge Torbett found that there were no unreclaimed highwalls as they are defined by regulation (i.e., a "face of

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<sup>8/</sup> Also, as Judge Torbett noted, deviations of this sort were incorporated into the postmining contours approved by OSM prior to any mining. See Decision at 20 (referring to Exh. A-38 (Map No. 10) and Exh. A-39 (Map No. 7)). There is no evidence that appellants challenged issuance of the permits in this respect.



exposed overburden and coal in an open cut of a surface coal mining activity," 30 CFR 701.5) on either of the mine sites. See Decision at 21. Appellants' witness Dirk Elzinga, a land surveyor, after having testified to the alleged highwall, acknowledged the soil slope was about 45 degrees but asserted this would constitute a highwall in his opinion (Tr. 223). Andrew Gilmore, manager of regulatory programs with the Birmingham Field Office of OSM, who had visited the site more than a dozen times, testified that inspection of the site disclosed no remaining highwall (Tr. 340-42). Asked specifically about the site referred to by Elzinga, he stated that the reclamation of the highwall was successful as far as grading was concerned (Tr. 342). <sup>9/</sup> Accordingly, we find the decision of the Administrative Law Judge regarding the absence of an unreclaimed highwall is supported by the preponderance of the evidence.

Appellants also contend that, in reclaiming the permit areas, JCMC substantially changed the drainage patterns that existed prior to the initiation of mining. See SOR at 2. They submitted evidence of changes in drainage. See Tr. 203, 205, 225-26, 238, 276-77, 303-04, 306, 315; Exh. A-37. Section 701(2) of SMCRA requires the permittee to return the reclaimed land to its AOC, ensuring that the general configuration of the land "blends into and complements the drainage pattern of the surrounding terrain." 30 U.S.C. § 1291(2) (1988); 30 CFR 701.5. The statutory requirement has been interpreted to require that water coming from the surrounding terrain and intercepted within the mined land "flows through and from the reclaimed area in an unobstructed and controlled manner" (Exh. G-2 at 3). See Tr. 29, 102. The evidence supports a finding that this has been achieved. See Tr. 34-35, 77. No requirement is found in SMCRA or its implementing regulations that drainage patterns shall be unchanged following reclamation. Indeed, some changes are to be expected when reclaiming to AOC which may embrace some alteration of the original premining contour. See Tr. 225. Accordingly, we affirm Judge Torbett's finding that JCMC had complied with this requirement. See Decision at 21.

Finally, appellants assert that JCMC failed to reclaim the land to the point that, even with adequate revegetation, it would support the approved postmining land use identified in the reclamation plans, *i.e.*, pasture. See Posthearing Brief at 21-23.

Section 515(b)(2) of SMCRA, 30 U.S.C. § 1265(b)(2) (1988), generally requires a permittee, during the entire course of reclamation, to "restore the land affected to a condition capable of supporting the uses which it was capable of supporting prior to any mining, or higher or better uses of which there is reasonable likelihood." See also 30 CFR 816.133. A

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<sup>9/</sup> While it appears from appellants' evidence that there is a small area where the graded soil is bare, we think the issue of successful revegetation is properly distinguished from the question of grading to eliminate all highwalls when adjudicating a Phase I bond release.

permittee is not required to complete this level of reclamation at the time it seeks a Phase I bond release. The subject land would not be considered pasture until after revegetation, which is not a prerequisite to a Phase I release. See 30 U.S.C. § 1269(c)(2) (1988); Newtex Management Corp., 117 IBLA 380, 384-85 (1991). Rather, the issue on appeal from a Phase I release decision is whether the land has been backfilled and graded so as to "support" the approved postmining land use, 10/ as required by 30 CFR 816.102(a).

Appellants are concerned that rocks as well as rills and gullies remaining on the reclaimed land following backfilling and grading will interfere with the approved postmining land use. See Posthearing Brief at 9-10, 25-26. So far as rock is concerned, we note that the permittee is expressly required by its revised permit to remove rock that would "impede surface activities associated with pasture management" (Letter to American Standard from OSM, dated Jan. 27, 1987, at 3). This would also be true of any rills and gullies that would impede such activities. Id. Kenneth K. Lewis testified on behalf of appellants to the effect that rocks he saw on the lands in the permits would interfere with the use of farm equipment (Tr. 145, 147). However, Lewis had not been on the land since March 1987. Appellants' witness William K. Gilmer also testified to the presence on the permits of stones too large to permit operation of farm equipment (Tr. 161-62). William H. Pullen, Jr. testified to the presence of rocks which interfere with operation of farm machinery (Tr. 275). Pullen acknowledged, however, that rocks may have been removed since 1986-87 (Tr. 286). Asked if changed conditions regarding the presence of rocks, rills, and gullies would alter his opinion of the suitability of the land for postmining use, Edward L. Holmes, witness for appellants, replied: "Yeah, I'm sure it would" (Tr. 171). David Dykes, testifying on behalf of OSM, indicated that there was a problem with surface rock on the mine site at one time, but that OSM issued a citation and the rocks were picked up to abate the violation (Tr. 42). Similar testimony was offered by Andrew R. Gilmore (Tr. 119). Gilmore testified

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10/ The extent to which the approved postmining land use encompassed not only use of the land as pasture for livestock grazing, but also activities undertaken to manage the land for related purposes (e.g., harvesting hay) is not entirely clear from the permits. Permit GA-006 provides that the permittee will reclaim the land "for use as a pasture which can support grazing" (TEA (GA-006) at V-26). As a condition of issuance of permit GA-002, the applicant was required to stipulate to develop a "management plan for use and maintenance of the proposed pasture land" (Permit GA-002 at 6, Stip. 12-8-82-18). We note that "pastureland or land occasionally cut for hay" is defined in the regulations relating to land use as land "used primarily for the long-term production of adapted, domesticated forage plants to be grazed by livestock or occasionally cut and cured for livestock feed." 30 CFR 701.5. Also, the revised permits provided for the occasional cutting of hay for use by livestock. See Revised Reclamation Plan attached to Letter to OSM from TARE, dated Nov. 17, 1986, at 2.

132 IBLA 233

IBLA 92-335

that there were no more rocks than normal in the area (Tr. 128). Based on the record, we affirm the finding of the Administrative Law Judge that the land has been backfilled and graded so as to support the postmining use. 11/

Moreover, the removal of rocks and the correction of rills and gullies are required by OSM to be "ongoing activit[ies]" during the entire reclamation process (Letter to American Standard from OSM, dated Jan. 27, 1987, at 3). See also 30 CFR 816.95(b); Palmer Coking Coal Co. v. OSM, supra at 268. This is especially so where such activities concern the restoration of the land to a condition capable of supporting the approved postmining land use, which need only be fully achieved at the conclusion of reclamation. See 30 CFR 816.95(b). It is not necessary that the situation be fully remedied at the time of a Phase I bond release. See Tr. 63, 78. 12/

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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C. Randall Grant, Jr.  
Administrative Judge

I concur.

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Gail M. Frazier  
Administrative Judge

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11/ We agree with Judge Torbett that the rills and gullies remaining on the land, as of OSM's May 1988 decisions, do not preclude a Phase I bond release where JCMC has generally succeeded, as a result of its backfilling, grading, and related efforts, in "[m]inimiz[ing] erosion" from the reclaimed land by stabilizing the existing channels, as required by 30 CFR 816.102(a)(4) and its reclamation plans. See Decision at 21-22. The presence of rills and gullies does not (by itself) establish that there has been a failure of stabilization efforts. See Tr. 162, 209; Palmer Coking Coal Co. v. OSM, 96 IBLA 266, 268-69 (1987).

12/ Appellants have also argued that some of the reclaimed land was not backfilled and graded so as to support the approved postmining land use where it was left in places with slopes in excess of 12 percent (i.e., a 12-foot rise or drop in elevation over a 100-foot distance). See Posthearing Brief at 21-23. We agree with Judge Torbett that JCMC acted properly since OSM approved a revision of the permits in January 1987 that excepted land with steeper slopes (i.e., 12 percent or greater) from the general provision for postmining land use as pasture. See Tr. 69, 117-18; Exh. G-5 at 2; Revised Reclamation Plan attached to Letter to OSM from TARE, dated Nov. 17, 1986, at 1. Rather, this land has an approved use as forest.

132 IBLA 234